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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

BURTON IKARD, CHARLES IKARD AND ERMA IKARD,
Petitioners,

v.

ESTATE OF CHARLES D. WYCHE, DECEASED, AND MEYER RABEN,
Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners Burton Ikard, Charles Ikard and Erma Ikard respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on February 12, 1973.

OPINIONS BELOW

The Court of Appeals entered no opinion; its *per curium* affirmance and its order denying rehearing appear in the Appendix hereto. The District Court for the Northern District of Texas entered no opinion; its Judgment and Amended Judgment appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit in the present case was entered on February 12, 1973; it affirmed the judgment of the District Court for the Northern District of Texas, dated November 15, 1971, and amended January 5, 1972, which dismissed the petitioners' complaint and denied the petitioners' application for leave to amend. The Court of Appeals denied a timely petition for rehearing on March 13, 1973. On June 28, 1973, Mr. Justice Powell signed an order extending the time for filing this petition to and including July 13, 1973. The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

The trial court, ruling in chambers during a recess in civil jury trial proceedings, denied the petitioners' application pursuant to Rule 15(a) of the Federal Rules of Civil Procedure for leave to amend their complaint, after sustaining the respondent's motion to strike and before dismissing petitioners' complaint, as stricken, for failure to request relief in the jurisdictional amount required in diversity actions. The action of the trial court was taken without affording the petitioners the opportunity for an adequate hearing. The question presented for review is whether the trial court abused its discretion under Rule 15(a) in so ruling.

RULE INVOLVED

FEDERAL RULES OF CIVIL PROCEDURE:

Rule 15(a): Amended and Supplemental Pleadings (Amendments)

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed on the trial calandar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given where justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

STATEMENT OF THE CASE

This proceeding arose out of the failure of the late Charles D. Wyche to loan the petitioners a sum of money totalling $450,000.00, with which the petitioners had intended to expand their commercial farm operations on three tracts of land owned by them and located in Cimarron County, Oklahoma. Throughout this proceeding, the petitioners have contended that Wyche's promise to loan this sum of money was embodied in a letter form loan purchase agreement, signed by Wyche on or about September 9, 1968, and accepted by petitioners on October 9, 1968; the letter agreement in question was captioned "Re: Three sections of real estate and all improvements," and provided in pertinent part that Wyche agreed "to purchase a loan which

is to be secured by a first mortgage on the above captioned premises . . ." In expectation of the receipt of this loan from Wyche, the petitioners obligated themselves in interim financial arrangements with third parties, and expended additional sums in preparing their farm property for large-scale expansion. Following Wyche's refusal and failure to loan the sum of money in question, the petitioners forfeited to creditors all their title in their farm property, in the improvements thereon, and in miscellaneous personalty involved in their farming operations; in addition, they were denied the future profits which would have accrued from the expanded operation to have been financed by the Wyche loan.

On August 5, 1970, after the death of Charles D. Wyche, the petitioners commenced the instant action in the United States District Court for the Northern District of Texas against the Estate of Charles D. Wyche, Deceased, the defendant below and a respondent here. The jurisdiction of the District Court was invoked on the basis of diversity of citizenship, the original complaint alleging that plaintiffs were residents of Oklahoma and that the defendant Estate was domiciled in Texas.[1] Thereafter, respondent Meyer Raben, formerly an agent of Wyche, was joined by the Estate of Charles D. Wyche, Deceased, as a third-party defendant.

---

[1] Subsequent to the filing of the original complaint, new counsel for the petitioners ascertained that on the date of that filing, petitioner Charles Ikard was in fact a resident of Texas. This discovery was the basis of petitioners' Motion to Dismiss for Want of Jurisdiction, filed with the District Court on January 17, 1973. Lack of proper diversity jurisdiction also was briefed and argued by the petitioners before the Court of Appeals, but it is not urged as an issue for review in this petition.

In the instant action, the petitioners sought specific performance of their loan purchase agreement with the late Charles D. Wyche or, in the alternative, damages for Wyche's breach of that agreement. On October 1, 1971, a pretrial conference was held in the case and, as required by the District Court, the petitioners filed an amended complaint on that date; in the alternative to specific performance, the petitioners' amended complaint prayed judgment for additional damages in total amount of $25,950,141.68.

On October 14, 1971, the respondent Estate filed a motion to dismiss petitioners' complaint, stating in pertinent part that the loan purchase agreement between Wyche and the petitioners was "totally void and unenforceable under the Statute of Frauds, Article 3995, Texas Civil Statutes, and the Statute of Conveyances, Article 1288, Texas Civil Statutes, because the land is not described therein with reasonable certainty." On November 1, 1971, the respondent Estate filed with the District Court a motion to strike portions of the petitioners' amended complaint, stating a variety of grounds. Neither the October 14 nor the November 1 motion of respondent was the subject of any action by the District Court before the case was called for trial.

On November 3, 1973, the petitioners filed an application for leave to amend their first amended complaint, in order that it might be made to show and describe with particularity the nature of the three tracts of farm property which were the petitioners' sole land holdings at the time of their loan purchase agreement with Wyche. No action was taken on the Petitioners' motion before the case was called for trial.

On November 15, 1971, the case was called for jury trial by the Honorable Judge Sarah T. Hughes. By approximately 10:15 A.M., a panel of jurors had been selected; thereupon, the case was recessed until 1:30 P.M. Between 1:00 P.M. and 1:30 P.M., however, during an off-the-record conference in chambers convened without prior notice to counsel for petitioners, the trial judge proceeded to dispose of new and pending motions.

In the first ruling pertinent to the issues presented on this petition, the respondent Estate's pending (November 1st) motion to strike was sustained, according to an amended judgment issued on January 5, 1972 on the ground that the agreement between the petitioners and Wyche was void by reason of the Statute of Frauds.[2]

A new written application for leave to amend filed by the petitioners on November 15, 1972, seeking to allege additional facts showing the certain identity of the three parcels of land referred to in the written loan purchase agreement referred to in the complaint. Petitioners' application was denied in chambers. Petitioner's application recited particular proposed amendments to the petitioners' complaint, commencing with an allegation that "[t]he loan agreement stated specifically that the loan to be made was made on the condition that the existing encumbrances on the said three (3) sections of land would be paid off. . . ." Considered separately from the amendments detailing the nature of these three tracts, proposed in the petitioners' previous application for leave to amend, which had

[2] It should be noted that the Statute of Frauds originally had been advanced by the respondent Estate on its motion to dismiss of October 14, rather than on its motion to strike of November 1.

been pending since November 3, the additional matter proposed in petitioners' application of November 15 was meaningless. Nevertheless, during this session in chambers the trial judge took no action whatsoever on the petitioners' prior (November 3rd) pending motion for leave to amend. Instead, the petitioners' complaint, as stricken, was dismissed altogether, on the ground that the remaining prayer for relief as striken and without further amendment sought damages in the amount of $7,500.00 only. Appendix, p. 2a.

At the direction of the trial judge, this critical stage of the proceedings in the District Court was not reported, according to counsel below. According to the counsel for petitioners, present in chambers on November 15, however, no formal or informal hearing was held on any of the motions decided; in particular, counsel for petitioner was afforded no apportunity to present arguments or authorities in support of the petitioners' newly filed application for leave to amend. Within 30 minutes, the trial judge disposed of a total of six months, and dismissed the case. Only subsequently, in the Amended Judgment entered January 5, 1972, after the denial of the petitioners' original and amended motions for a new trial, were the grounds of the trial judge's rulings of November 15, 1972, made clear. Only by way of the Amended Judgment, were the petitioners informed that their request for leave to amend—by which they had sought to present new allegations to meet the respondents, Statute of Frauds objection—had been denied for the circuitous reason that "such amendment alleges damages arising from the contract which is void by reason of the Statute of Frauds." Appendix, p. 2a. Having denied petitioners' motion for leave to amend, the court dismissed the complaint as stricken because: "After striking the

paragraphs pursuant to the Defendant's Motion to Strike, the complaint contains only an action for an alleged commitment fee of $7500. The relief being below the required jurisdictional amount, Defendant's Motion to Dismiss is sustained and the case is dismissed." Appendix, p. 2a.

On their appeal to the Court of Appeals, petitioners did not argue the merits of the Statute of Fraud defense. Instead, they contended, *inter alia,* that in light of the circumstances surrounding the District Court's refusal of petitioners, motion for leave to amend on November 15, 1971, the denial constitutes a clear abuse of discretion, in violation of Article 15(a) of the Federal Rules of Civil Procedure. By its affirmance, without opinion, and by its order denying a rehearing, the Court of Appeals in effect endorsed the procedures employed by the District Court. Appendix, pp. 3a and 4a.

REASONS FOR GRANTING THE WRIT

The trial court's denial of petitioners' application for leave to file an amended complaint, subsequently affirmed by the court of appeals, was a marked departure from the accepted and usual course of judicial proceedings. By its actions, the trial court ruled in contravention of the letter and spirit of Rule 15(a) of the Federal Rules of Civil Procedure; in addition, the rulings in question are in conflict with the governing decision of this Court in *Foman* v. *Davis,* 371 U.S. 178 (1962).

By its action, the Court of Appeals below also set itself at odds with those courts of appeals which have held that an amendment under similar circumstances should be granted as a matter of right. Review by

this Court, pursuant to its power of supervision over the federal judiciary, is both appropriate and necessary to ensure that the fair and sensible policy of the Federal Rules of Civil Procedure regarding amendment to pleadings is observed in practice; it is also required to resolve an implicit conflict among the Courts of Appeals. This Court's action also is necessary to insure that petitioners will not suffer substantial prejudice from the erroneous procedural rulings of the courts below; in the words of Rule 15(a) itself, the petitioners' motion should have been granted as "justice so requires."

The immediate importance to the petitioners of this question presented for review is clear. If the rulings of the courts below are not reversed, the petitioners will be without judicial recourse to seek enforcement of the contract obligation owed them by respondents, or to seek damages for the breach of that obligation. Rule 41(b), Federal Rules of Civil Procedure. The damages to the petitioners which are alleged as flowing from the breach of contract in question are substantial: As a direct result of the failure of the late Charles D. Wyche to lend money as promised and agreed, the petitioners have been forced to forefeit valuable real and personal property through a series of mortgage foreclosures; they have been deprived of the profits which would have accrued to them had Wyche's promise been fulfilled (the prayer for relief of the petitioners' complaint in the trial court was in excess of $25,000,000.00); and they have been deprived of their day in Court.

Important, too, is the significance of the principle presented for review to the sound and proper administration of the federal judicial system. If federal trial courts are permitted to ignore the unambiguous

mandates of the Federal Rules of Civil Procedure and the decisions of this Court in their rulings upon motions to amend or modify pleadings, the vital purpose stated in Rule 1—"to secure the just, speedy and inexpensive determination of every action"—will be frustrated, and supercilious technicalities of pleading will be reintroduced into federal jurisprudence. See *Conley* v. *Gibson,* 355 U.S. 41 (1957).

The ruling of the trial court was contrary to the language and intent of Rule 15(a) of the Federal Rules of Civil Procedure: "[L]eave shall be freely given when justice so requires." After trial began, the petitioners were suddenly confronted by the trial court with its ruling in chambers on a motion to strike which had been filed two weeks before, but inexplicably had not been heard or determined by the trial court until after the trial started and a jury was impanelled. Faced with the possibility that their complaint might be dismissed without completion of the trial, the petitioner requested a needed opportunity to allege new facts in support of their theory of recovery. The interests of complete and impartial justice would have dictated that they receive such an opportunity. Nothing in the record suggests that the petitioners had been guilty of dilatory tactics, bad faith or undue delay. The only reason supplied by the trial court for its denial of the petitioners' application for leave to amend was given in its later Amended Judgment of January 5, 1972: "[S]uch amendment alleges damages from the contract which is void by reason of the Statute of Frauds." Appendix, p. 2a. On the date of the original judgment (November 15, 1971), however, petitioners were afforded no adequate opportunity to present argument and authori-

ties to support their motion for leave to amend their complaint and to demonstrate that the facts alleged in their proposed amendment were sufficient to overcome the objections of the Statute of Frauds.

In fact, the trial court's precipitous action makes any review of its determination impossible; by its very nature, the court's action in chambers was unnecessary and prejudicial.

While Rule 15(a) of the Federal Rules of Civil Procedure does not dictate that every request for leave to amend must be granted, the policy supporting the rule and the basic requirements of justice upon which the rule is rationalized dictate that every such request should receive deliberate judicial consideration. Several Courts of Appeal have indicated that the legal sufficiency of a proposed amended complaint ordinarily is not a matter to be considered on a motion for leave to amend, but is to be determined on the merits after the amendment is allowed. See *Fox* v. *City of West Palm Beach,* 383 F.2d 189 (5th Cir. 1967); *Brier* v. *Northern California Bowling Proprietors' Association,* 316 F.2d 787 (9th Cir. 1963); and *Peterson Steels, Inc.* v. *Seidmon,* 188 F.2d 193 (7th Cir. 1951).[3] The proceedings in the trial court herein illustrate the wisdom of such a policy. In the inevitable rush following commencement of jury trial, the legal merits of the respondents' proposed amended complaint could not be fully argued nor adequately considered before their motion for leave to amend was determined. Had the proposed amendment first been

[3] But see, contra, *Seymour* v. *Johnson,* 235 F.2d 181 (6th Cir. 1956).

allowed, however, the amended complaint could have been fully tested for legal sufficiency through proceedings on a duly argued motion to dismiss. The undesirability of the procedure actually employed by the trial court is compounded by the fact that at the date of trial the court had had before it, for 32 days (since October 14) a motion to dismiss the complaint, for 14 days (since November 1) a motion to strike the complaint, and for 12 days (since November 3) a motion for leave to amend the complaint. If a full timely pre-trial hearing had been afforded on any one of these motions, the objectionable procedure finally employed would have been avoided.

Where a motion for leave is denied without deliberate consideration of the nature of the proposed amendment, the policy of Rule 15(a) of the Federal Rules of Civil Procedure clearly has been violated. And as several Courts of Appeal have held, leave to amend should be granted with special liberality where a plaintiff's whose complaint has been subject to a successful motion to dismiss desires to attempt to meet the trial court's objections. *E.g., Developer's Small Business Investment Corp.* v. *Hoeckle,* 395 F.2d 80 (9th Cir. 1968); *Austin* v. *House of Vision, Inc.,* 385 F.2d 171 (7th Cir. 1967). In granting the respondent's motion to strike the bulk of petitioners' complaint, on the ground that recovery on the basis of its principal allegations was barred by the applicable state Statute of Frauds, the trial court treated that motion as one to dismiss for failure to state an actionable claim. In denying the petitioners' application to file an amended complaint made immediately after its ruling on the motion to strike, the trial court denied the petitioners all opportunity to present additional allegations of fact which might have been deemed a legally sufficient

basis for recovery.[4] In affirming the trial court's judgment, the Court of Appeals put itself into implicit direct conflict with those Courts of Appeals whose decisions are noted above.

The extent of the trial court's departure in this case from usual and accepted modes of proceeding is clear from a reading of this Court's governing decision in *Foman* v. *Davis,* supra. On their facts, the two cases appear essentially identical. In each case, the plaintiffs below sought recovery against the estate of a deceased person on the basis of a promise made during his lifetime. In each case the defendants below moved that the statute of frauds was a defense. In each case, too, the motions of defendants below were sustained, and were followed by motions by the plaintiffs for leave to amend. In each case, the latter motions were denied. In reversing the judgment of the Court of Appeals in *Foman* v. *Davis,* supra, this Court held as follows:

> Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded. See generally, 3 Moore, Federal Practice (2d ed. 1948), ¶¶ 15.08, 15.10. If the underlying facts or circumstances relied upon by plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave

[4] If this petition for certiorari is granted, petitioners will argue—in addition to their primary contention that the denial of leave to amend was erroneous—their contention that a Motion to Strike pursuant to Rule 12 (f) of the Federal Rules of Civil Procedure is an inappropriate vehicle for testing the substantive merits of a complaint. *Augustus* v. *Board of Public Instruction,* 306 F.2d 862 (5th Cir. 1962).

> sought should, as the rules require, be "freely given." Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.
> 371 U.S. at 182.

For the purposes of this petition, there is only one notable variance between the facts of *Foman* v. *Davis,* supra, and the facts herein. While the trial court in *Foman* v. *Davis,* supra, gave no "justifying reason" for its denial of leave to amend, the trial court herein belatedly supplied a justification, but it was one which a full and fair hearing on petitioners' motion could have shown was without foundation.

These proceedings of the trial court, which denied the petitioners that opportunity, amounted to a clear abuse of the court's discretion and was in violation of Rule 15(a) and the interpretation of that Rule by this Court in *Foman* v. *Davis,* supra.

CONCLUSION

For those reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DIVISION OF TEXAS
DALLAS DIVISION

No. 3-4058-B

BURTON IKARD, CHARLES IKARD, AND ERMA IKARD, *Plaintiffs*

v.

ESTATE OF CHARLES D. WYCHE, Deceased, *Defendant*

Judgment

BE IT REMEMBERED that on the 15th day of November, 1971, came on regularly to be heard the above entitled and numbered cause and came the parties in person and by their attorneys whereupon the Court made the following rulings:

1. Defendant's Motion for Summary Judgment is overruled;

2. Defendant's Motion to Strike is sustained;

3. Plaintiffs' Motion to Reconsider the Defendant's Motion to Strike is overruled;

4. Plaintiffs' application to amend, filed this day, is denied;

5. Defendant's Motion to Dismiss is sustained for the reason that Plaintiffs' failed to state a cause of action and the case is accordingly dismissed; and

6. Defendant's Third Party Complaint against Meyer Raben is now moot and it is hereby also dismissed.

PREMISES CONSIDERED, all costs are adjudged against the Plaintiffs for which let execution issue.

/s/ SARAH T. HUGHES
Judge Presiding

(*Same Caption*)

Amended Judgment

On this 5th day of January, 1972, this Court considered the proposed Nunc Pro Tunc orders filed by the parties with respect to the judgment entered on November 15, 1971 in the above case. After consideration of the proposed orders and other supplemental motions and briefs submitted by the parties, the Court files this Amended Judgment in clarification of the rulings made on November 15, 1971. The Court makes the following rulings:

1. Defendant's Motion for Summary Judgment is overruled;

2. Defendant's Motion to Strike is sustained for the reason that the contract, which is the subject of the actions asserted in the striken paragraphs, is void by reason of the Statute of Frauds;

3. Plaintiffs' Motion to Reconsider the Defendant's Motion to Strike is denied;

4. Plaintiffs' application to amend, filed on November 15, 1971, is denied for the reason that such amendment alleges damages arising from the contract which is void by reason of the Statute of Frauds;

5. After striking the paragraphs pursuant to the Defendant's Motion to Strike, the complaint contains only an action for an alleged commitment fee of $7500. The relief being below the required jurisdictional amount, Defendant's Motion to Dismiss is sustained and the case is dismissed;

6. Defendant's Third Party complaint against Meyer Raben is now moot and it is hereby also dismissed.

Premises considered, all costs are adjudged against the Plaintiffs for which let execution issue.

/s/ Sarah T. Hughes
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-1314

BURTON IKARD, CHARLES IKARD, AND ERMA IKARD,
Plaintiffs-Appellants

v.

ESTATE OF CHARLES D. WYCHE, deceased,
Defendant-Third Party Plaintiff-Appellee,

AND

MEYER RABEN,
Third Party Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

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(February 12, 1973)

Before TUTTLE, WISDOM AND SIMPSON, Circuit Judges

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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[1] See NLRB v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-1314

BURTON IKARD, CHARLES IKARD, AND ERMA IKARD,
Plaintiffs-Appellants

v.

ESTATE OF CHARLES D. WYCHE, deceased,
Defendant-Third Party Plaintiff-Appellee,

AND

MEYER RABEN,
Third Party Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

---

(March 13, 1973)

On Petition for Rehearing

Before TUTTLE, WISDOM AND SIMPSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

FILE COPY

FILED
AUG 13 1973
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-117

BURTON IKARD, CHARLES IKARD AND ERMA IKARD,

Petitioners,

v.

ESTATE OF CHARLES D. WYCHE, Deceased, and MEYER RABEN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-117

BURTON IKARD, CHARLES IKARD AND ERMA IKARD,

Petitioners,

v.

ESTATE OF CHARLES D. WYCHE, Deceased, and MEYER RABEN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JUDGMENTS BELOW

The judgments of the District Court and Court of Appeals are attached to Petitioners' Brief as an appendix.

QUESTION PRESENTED

Whether the Court of Appeals erred in holding that the trial court did not abuse its discretion in refusing to allow Petitioners' Amended Complaint to be supplemented by an additional amendment, where the amendment was tendered after a jury had been empaneled and was expressly found not to remedy the fact that the contract upon which both the Amended Complaint and the additional Amendment were based

was barred by the statute of frauds, and where Petitioners failed to show or attempt to show, either in the Court of Appeals or in the instant proceeding, that the amendment would have circumvented the statute of frauds or otherwise assisted Petitioners.

STATEMENT OF THE CASE

This suit was brought by Petitioners in an attempt to enforce an alleged contract between them and Charles D. Wyche, now deceased, under the terms of which Wyche allegedly had agreed to loan Plaintiffs money in return for a mortgage on real property. After considerable pre-trial activity, including two pre-trials and the granting on separate occasions of Petitioners' Motion for Continuance and a Motion to Amend, the case came to trial on November 15, 1971. Shortly after the parties arrived at the courtroom and prior to selecting the jury, the Court advised the parties of its belief that Respondent's Motion to Strike was meritorious, and after a brief voir dire by the Court and the selection of the jury, the attorneys were excused. At 1:30 P.M. the Court held a hearing in Chambers on Respondent's Motion to Strike and Petitioners' Application to Amend, the latter of which was filed at that time. Since neither party requested that the hearing be reported, the proceedings do not appear in the record. After hearing arguments for approximately thirty minutes, the Court concluded that the contract upon which both Petitioners' Amended Complaint and additional amendment were based was barred by the statute of frauds, and entered judgment sustaining Respondent's Motion to Strike and dismissing Petitioners' remaining $7,500 claim as insufficient to constitute the requisite jurisdictional amount.

In response to Petitioners' Application for Nunc Pro Tunc order, which complained that the original judgment did not reflect the true intentions of the Court in that it made the dismissal with prejudice, the Court of January 5, 1972, filed an Amended Judgment in order to make clear in the record the basis of its previous rulings. This Amended Judgment pointed out that Petitioners' Application to Amend, filed November 15, 1971, the day of the original Judgment, was overruled for the reason that the proposed amendment did not remove the cause from the statute of frauds. Accordingly, the Amended Judgment also sustained Respondent's Motion to Strike for the reason that the alleged contract was void by reason of the statute of frauds, and dismissed the remaining claim for $7,500.00 as below the jurisdictional amount.

ARGUMENT

Respondent would first point out that Petitioners' statements concerning the method by which the trial court handled the proceeding are almost wholly without support in the record and, moreover, are misleading and largely incorrect. Although it would be impractical to summarize all of the proceedings, both on and off the record, Respondent would point out by way of example that the trial court did not, as stated by Petitioners (Application for Certiorari, page 7) direct that the hearing on Respondent's Motion to Strike and Petitioners' Motion for Leave to Amend not be reported, but, on the contrary, the hearing was not reported because neither party requested that it be done. Petitioners' further statements that no hearing was held on the motions and that they were afforded

no opportunity to present arguments or authorities likewise are incorrect. In fact, the entire thrust of the argument at the hearing was based upon the failure of the alleged contract to comply with the statute of frauds, and the Court informed the parties that this was the basis of its ruling. If, as is stated by Petitioners, the trial court did not make the grounds of its ruling clear until the Amended Judgment was entered on January 5, 1972, it is most curious why Petitioners on November 26, 1971, chose to file a "Brief in Support of Motion for New Trial", which, albeit futilely, argued only that the contract was not barred by the statute of frauds and that Petitioners should have been granted leave to amend.

We note that in their application, Petitioners' state that the above statements, as well as their assertion that the trial court failed to make clear the reason for its rulings are "according to counsel below" (page 7). "Counsel below" apparently refers to attorney Robert F. Boruk, who, in order to support his then primary (but now discarded) ground of appeal in the Court of Appeals, represented to the Court that he had not entered the case until November 15, 1971, whereas, in fact, he had taken a deposition in the case on October 18, 1971, and had filed with the Court Petitioners' "First Amended Complaint" on October 14, 1971. In any event, even if Petitioners' version of the events transpiring at the time the trial court's rulings were made, were correct, Petitioners have wholly failed to show that they have suffered any prejudice thereby, particularly in light of the fact that, as will be shown below, the trial court's rulings were correct.

In *Foman v. Davis*, 371 U.S. 978 (1962), this court specified

several reasons for which the trial court may properly decline to exercise its discretion to allow an amendment. These reasons include "futility of amendment," "undue delay," "repeated failure to cure deficiencies by amendments previously allowed" and "bad faith or dilatory motive on the part of the movant". All of these reasons are present in the instant case.

Here, of course, Petitioners' amendment was incorporated in their Application to Amend, and the court not only had opportunity to review the amendment, but also to hear arguments thereon and to consider Petitioners' brief in support of their motion for new trial which dealt with the subject. Moreover, the Amended Judgment specifically states at paragraph IV that:

> "Plaintiffs' Application to Amend, filed on November 15, 1971, is denied for the reason that such amendment alleges damages arising from the contract which is void by reason of the Statute of Frauds; * * *"

Since the trial court ruled that even the matter contained in Petitioners' Application to Amend their Amended Complaint is insufficient to withstand the statute of frauds defense, it would be of little use to allow yet another amendment. Although Petitioners have failed to brief or argue either in this court or in the Court of Appeals their apparent belief that the proffered amendment would have satisfied the statute of frauds, they have stressed that their amendment specified the property descriptions of the three tracts of land allegedly covered by the contract. It is, however, no answer to a ruling that the alleged contract was barred by the statute of frauds because of an insufficient property description merely to allege such a property description in one's pleadings. Instead, it

was the contract which was unenforceable because of its failure to specify the property description, and no amount of pleading could change this fact.

In *Fox v. City of West Palm Beach*, 383 F. 2d 189 (5th Cir. 1967), the court held that there was no abuse of discretion in denying an amendment adding new matter that was insufficient under the applicable law. Concerning the sufficiency of the amendment to the Complaint, the court stated that:

> "The sufficiency may be considered on appeal in determing whether there has been an abuse of discretion."

Here, of course, Petitioners have wholly failed, either in this court or in the Court of Appeals, to present any grounds of error, arguments or authorities to the effect that their amendment to the Amended Complaint would have changed the fact that the underlying contract was barred by the statute of frauds. Accordingly, it would be inappropriate for this court to exercise its discretion to grant a writ of certiorari to inquire into a point which the Court of Appeals had no occasion to consider. See also, *Asher v. Harrington*, 461 F. 2d 890 (7th Cir. 1972) and *Key Pharmaceuticals, Inc. v. Lowery*, 54 F.R.D. 447 (S.D. N.Y. 1972). Certainly, Petitioners' contention that the action of the trial court "makes any review of its determination impossible" is untenable. (Application p. 11) Even if the actions of the trial court were done in the manner in which Petitioners stated, and even if this were to be unfair to them, still, Petitioners have failed to even attempt to show that the rulings were incorrect as to the statute of frauds and therefore harmful.

Likewise, in affirming the trial court's refusal to grant an

amendment, the court in *Deloach v. Woodley*, 405 F. 2d 496 (5th Cir. 1969) cited *Foman v. Davis, supra.*, and stated:

> "The liberal amendment rules of F.R. Civ. P. 15(a) do not require that the courts indulge in futile gestures. When a complaint, as amended, would be subject to dismissal, leave to amend need not be granted."

As was stated in *Kirsch v. Barnes*, 157 F. Supp. 671 (N.D. Cal. 1957) aff'd, 263 F. 2d 692:

> "Leave to file and amended complaint should not property be granted unless new facts are made to appear which would remedy the defects contained in the previous complaint."

Moreover, *Chapman v. Sheridan-Wyoming Coal Company*, 388 U.S. 621 (1950), held that since the amended complaint failed to state a claim for relief, the trial court correctly denied an amendment. See also, *Vickery v. Fisher Governor Co.*, 417 F. 2d 466 (9th Cir. 1969); and *Friedman v. Chesapeake & O. RR.*, 261 F. Supp. 728 (S.D. N.Y. 1966).

Other reasons mentioned in *Foman v. Davis, supra.*, also are present. Here, of course, the amendment in question was submitted on November 15, 1971, the day the cause was set for jury trial, and had leave to amend the Amended Complaint been granted, a further delay would have been required. Further, Petitioners had previously requested and received a continuance of the case, and suit was filed on August 5, 1970. In addition, Petitioners had already requested and received permission to file an Amended Complaint, and had done so. Concerning Petitioners' attitude on its repeated failure to cure the deficiency and the delay which an amendment would cause, Respondent notes that in the Court of Appeals, Petitioners went

so far as to argue that, in addition to the amendments theretofore granted and refused, the trial court should be directed:

> "to allow plaintiffs' reasonable time in which to prepare and file an amended complaint stating a cause of action against defendant with provisions that should defendant file pleadings attacking the sufficiencies of plaintiffs complaint insofar as it states a cause of action that these matters should be disposed of sufficiently in advance of trial to allow further amendment if necessary * * *."

Thus, Petitioners appear to be admitting not only that further delay would be necessary, but also that the material contained in their amendment is or may be inadequate to state a cause of action by virtue of the statute of frauds.

Concerning Petitioners' failure even to attempt to show either the Court of Appeals or this court that their amendment cures the statute of frauds problem, Respondent notes that *Neely v. Eby Construction Company*, 386 U.S. 317 (1967), held that it is the policy of this court not to consider issues which have not been presented to the Court of Appeals.

In addition to the other reasons specified in *Foman v. Davis*, there is also a question as to the good faith of Petitioners in this case. Not only did attorney Boruk make the previously discussed misrepresentation to the Court concerning the date he entered the case, but, in addition, there is other material in the record, discussed more fully in the briefs below, which cast doubt upon the credibility of his statements. Moreover, although Petitioners argue that the rulings of the court below leave them:

> "without Judicial recourse to seek enforcement of the contract obligation owed to them by Respondents, or to seek damages for breach of that obligation." (Application, page 9),

Petitioners filed Cause No. C-73-4 in the District Court of Cimarron County, Oklaoma, on February 26, 1973, asserting a cause of action identical to the one in question, and seeking damages of $31,000,000. Thus, it appears that they are, as the moving party, attempting to obtain judgments in both state and federal court for the same alleged cause of action.

As was stated in Moore's Federal Practice, ¶ 61.04[2], concerning the application of F.R. Civ. P. 61:

> "Error in the denial of leave to file a proposed amendment to a defective pleading is not reversible error where the amendment would not have cured the defect."

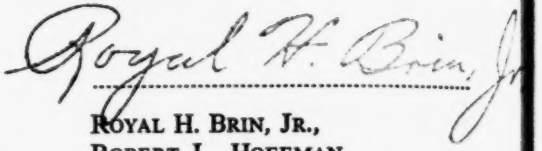
Here, of course, the trial court has so ruled, and Petitioners have made no effort to attack the merits of this ruling.

CONCLUSION

Petitioners would submit that there are no "special or important reasons" present in this case to merit the exercise of this court's discretion to grant a writ of certiorari. See Rule 19, Revised Rules of the Supreme Court of the United States. There are no novel or unusual points of law, and no questions of public importance, and certainly the rulings of the courts below are not in conflict with any cases of this Honorable Court or of the other courts of appeal. Instead, a remand of this cause merely to require an amendment which the trial

court has already considered in its ruling, would be a futile act.

Respectfully submitted,



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STATEMENT OF SERVICE

A copy hereof is being furnished to Ronald L. Goldfarb, 1616 H Street N.W., Washington, D.C. 20006, Peter A. Jaszi, 1616 H Street N.W., Washington, D.C. 20006, and Allen B. Mitchell, 300 East Lee, Supulpa, Oklahoma 74066.